IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOEL MONTES, on behalf of himself Individually, and ALL OTHERS SIMILARLY SITUATED ***Plaintiff,*** **vs.** **PRECISION DRILLING COMPANY LP, PD SUPPLY INC., AND PRECISION DRILLING CORPORATION,** ***Defendants.***	§ § § § § § § § § § § § §	**NO. 4:17-CV-01012**

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S ORIGINAL COLLECTIVE ACTION COMPLAINT

Dated: May 18, 2017

Respectfully submitted,

s/ David B. Jordan

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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JOEL MONTES, on behalf of himself Individually, and ALL OTHERS SIMILARLY SITUATED	§ § § §	
Plaintiff,	§ §	
vs.	§ §	**NO. 4:17-CV-01012**
PRECISION DRILLING COMPANY LP, PD SUPPLY INC., AND PRECISION DRILLING CORPORATION,	§ § § §	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S ORIGINAL COLLECTIVE ACTION COMPLAINT

Defendants Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation (collectively "Defendants") hereby move for dismissal of Plaintiff Joel Montes' Collective Action Complaint ("Complaint") against Defendants pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.
STATEMENT OF THE ISSUES TO BE RULED ON BY THE COURT

There are three issues to be ruled on by the Court:

(1) Whether Plaintiff's Complaint must be dismissed for failure to state a claim under Rule 12(b)(6) where the Complaint fails to allege facts sufficient to demonstrate that Defendants are employers under the Fair Labor Standards Act ("FLSA") or that Plaintiff was injured under the federal pleading standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See Joaquin v. Coliseum Inc.*, No. A-15-CV-787-LY, 2016 WL 3906820, at *2 (W.D. Tex. July 13, 2016), approved and accepted by 2016 WL 7647630 (W.D. Tex. Aug. 2, 2016) (Appendix, Exs. 1-2).

(2) Whether Plaintiff's only claim for overtime under the FLSA must be dismissed under Rule 12(b)(6) because Plaintiff offers nothing more than "unadorned, the defendant-unlawfully-harmed-me accusation[s]," which are insufficient to satisfy the federal pleading standard articulated in *Iqbal* and *Twombly*.

(3) Whether Plaintiff's putative collective action must be dismissed under Rule 12(b)(6) because Plaintiff does not allege sufficient facts to identify the putative class under the minimum federal pleading standard articulated in *Iqbal* and *Twombly*.

II.
NATURE AND STAGE OF THE PROCEEDING

On April 1, 2017, Plaintiff filed a collective action complaint against Defendants, alleging violations of the FLSA arising from Plaintiff's work as a welder. [ECF No. 1.] Defendants were served on April 13, 2017. [ECF No. 12.] On May 2, 2017, Defendants filed an unopposed motion to extend the deadline for Defendants to files their responsive pleading to Plaintiff's Complaint. [*Id.*] The same day, the Court granted Defendants' unopposed motion extending their deadline to file a responsive pleading to May 18, 2017. [ECF No. 13.]

In the Complaint, Plaintiff conclusorily alleges that he was "an employee" of Defendants, "not an independent contractor." [ECF 1, at ¶¶ 16-17.] He further alleges that he and the putative class "regularly worked more than 40 hours in a workweek," but were not paid overtime. [*Id.* at ¶¶ 35-36, 37.] With no other factual allegations, Plaintiff asserts a cause of action for overtime under the FLSA on behalf of himself and a putative class of "all Welders who worked for Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation at all locations throughout the United States, while not being paid time and a half for overtime hours worked in the last 3 years." [*Id.* at ¶¶ 15, 39, 40-44.]

III.
SUMMARY OF THE ARGUMENT

The Court must dismiss the Complaint in accordance with Rule 12(b)(6) as Plaintiff fails to plead sufficient facts to allow the Court to reasonably conclude Plaintiff's allegations are more than a sheer possibility. As a preliminary issue, Plaintiff fails to allege facts sufficient to establish that Defendants are even employers as defined by the FLSA. Because Plaintiff has not sufficiently alleged that Defendants can be held liable under the FLSA, Plaintiff fails to allege facts sufficient to demonstrate he was injured by Defendants and thus even has standing to bring this action.

Even if Plaintiff could overcome this threshold issue (he cannot), Plaintiff fails to allege any facts regarding his substantive claim for overtime. Instead, he merely recites the elements of his overtime claims and makes conclusory, threadbare allegations that are insufficient as a matter of law. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Twombly*, 550 U.S. at 555)). Finally, Plaintiff fails to allege sufficient facts to adequately define a putative class.

IV.
LEGAL STANDARD

Rule 12(b)(6) requires dismissal when the plaintiff "fail[s] to state a claim upon which relief can be granted." Although Federal Rule of Civil Procedure 8(a)(2) only requires a plaintiff to provide a "short and plain statement of the claim showing that the pleader is entitled to relief," to survive a motion to dismiss, a plaintiff's statement "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). To be plausible on its face, "a formulaic recitation of the elements of a cause of action" or "naked assertions" without supporting facts are inadequate. *Iqbal*, 556 U.S. at 678;

see also Twombly, 550 U.S. at 555, 557 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions.").

While the Court should assume the truth of well-pleaded factual allegations, it should disregard legal conclusions, even when cast or phrased as factual assertions. *Iqbal*, 556 U.S. at 679, 681. "Rule 8(a)(2) . . . requires a [factual] 'showing,' rather than a blanket assertion of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3. To survive a motion to dismiss, a plaintiff must allege actual facts that "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief," and the complaint should be dismissed. *Id.*

Moreover, when a complaint purports to be filed on behalf of a putative class, the pleading standard articulated in *Twombly* and *Iqbal*, likewise, applies to class allegations. *See Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (applying *Twombly* and *Iqbal* standards in the context of plaintiffs' class action). In a class action context, a named plaintiff who purports to represent a class "must allege and show that [he] personally [has] been injured, not that injury has been suffered by other, unidentified members of the class to which [he] belong[s] and which [he] purport[s] to represent." *Gratz v. Bollinger*, 539 U.S. 244, 289 (2003).

V.
ARGUMENTS & AUTHORITIES

A. Plaintiff Fails To Plead Sufficient Facts To Establish Standing

"Article III of the United States Constitution limits the jurisdiction of federal courts to actual 'Cases' and 'Controversies.'" *Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir, 2015) (citing U.S. CONST., art. III, § 2). To satisfy the case-or-controversy requirement, Plaintiff must show he has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Critically, "[t]he requirement of standing is not lessened for an individual plaintiff where that plaintiff files a class action complaint." *Joaquin*, 2016 WL 3906820 at *2 (Appendix, Ex. 1). "To demonstrate that they have standing, named plaintiffs in a class action must meet every element of standing as to each defendant, including alleging that they were injured by each defendant named in the suit." *Id.* (emphasis added) (citing *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 570 F. Supp. 2d 851, 856 (E.D La. 2008)). Thus, "[a] named plaintiff in a collective action adequately pleads standing against a particular defendant only if the plaintiff has alleged an injury that the defendant caused to him." *Id.*

1. Only An Employer May Be Held Liable For Claims Under The FLSA.

The FLSA applies only to "employees" who are "employed" by "employers." 20 U.S.C. § 207(a)(1); 29 U.S.C. § 203(e)(1). Thus, "[t]o be bound by the requirements of the Fair Labor Standards Act, one must be an employer." *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir. 1984) (citing 29 U.S.C. §§ 206, 207); *see also Howard v. John Moore, LP*, No. H-13-1672, 2014 WL 1321844, at *2 (S.D. Tex. Mar. 31, 2014) (same) (Appendix, Ex. 3); *Hamilton v. Partners Healthcare Sys., Inc.*, No. 09-11461-DPW, 2016 WL 3962810, at *5-6 (D. Mass. July 21, 2016) ("if [p]laintiffs have failed to allege a plausible FLSA employment relationship, there is no case or controversy and [p]laintiffs do not have standing.") (Appendix, Ex. 4). The FLSA's definition of "[e]mploy includes to suffer or permit work," and an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . [.]" 29 U.S.C. § 203(d). However broad, the FLSA's "employer" definition is not without limits.

To determine whether an employment relationship exists under the FLSA, the Fifth Circuit utilizes the economic reality test to analyze whether the putative employee is economically dependent on the alleged employer. *Gray v. Powers*, 673 F.3d 352, 354-55 (5th Cir. 2012). This test applies four factors, asking "whether the alleged employer: (1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 355 (internal quotation marks and citation omitted). A joint employment relationship may exist if there is an arrangement between two or more employers to share an employee's services, one employer acts in the interest of the other with respect to the employee, or the employers share control of the employee because one employer controls the other, but a mere recitation of a joint employer relationship is not enough to survive a motion to dismiss. *Joaquin*, 2016 WL 3906820 at * 6-8 ("Where a complaint seeks to hold more than one employer liable under the FLSA, at least some facts of the employment relationship must be set forth in order to make out a plausible claim of multiple employer liability under the FLSA.") (Appendix, Ex. 1). In fact, a plaintiff must "set forth sufficient factual averments to state a facially plausible claim that the . . . defendants are ***each*** 'employers' under the FLSA." *Kaminski v. BWW Sugar Land* Partners, No. 4:10-CV-00551, 2010 WL 4817057, at *2-3 (S.D. Tex. Nov. 19, 2010) (emphasis added) (dismissing FLSA action where plaintiffs pled only that they were "employed by" or "worked for" defendants) (Appendix, Ex. 5).

2. Plaintiff Fails To Allege Facts Showing An Employer/Employee Relationship.

Plaintiff makes the bare allegation that Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation[1] are "joint employers" without pleading facts sufficient to establish an employment relationship with each entity. [ECF No. 1 at ¶ 8.] In support of his claims, Plaintiff alleges:

[1] Precision Drilling Corporation does not have any employees within the United States.

- Whenever in this complaint it is alleged that the named Defendants committed any act or omission, it is meant that Defendants' officers, directors, vice-principals, agents, servants, parent company, subsidiaries or employees committed such act or omission and that at the time such act or omission was committed, it was done in the routine normal course and scope of employment of Defendants' officers, directors, vice-principals, agents, servants, parent company, subsidiaries or employees. [*Id.* at ¶ 7.]

- At all material times, Defendants have been employers within the meaning of 3(d) of the FLSA 29 U.S.C. § 203(r). Additionally, under 29 C.F.R. 791.2(b)(1)(3), when the "employers are not completely disassociated with respect to the employment of particular employees, and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by or is under common control with the other employer," a joint employment relationship exists. Here, Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation are joint employers as the term "joint employer" is defined by the Fair Labor Standards Act and interpreted by the United States Department of Labor. 29 C.F.R.791.2(b)(1)(2). [*Id.* at ¶ 8.]

- Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation would pay the welders, determine their rates of pay, and designate the number of hours worked per week and assign them to work locations. Defendants would supervise the welders, direct their day to day activities, inspect their work and otherwise control all aspects of the work performed by the welders. [*Id.* at ¶ 10.]

Plaintiff further asserts in conclusory fashion that he is an "employee" of Defendants and "not an independent contractor." [*Id.* at ¶¶ 16-17.] But notably, Plaintiff does not allege any specific facts to support these general propositions. In fact, it is not even clear ***how*** Plaintiff was classified. Rather, Plaintiff merely alleges threadbare allegations and recitations of law implying that he was categorized as an independent contractor. . [*See, e.g., id.* at ¶¶ 21-30.]

Significantly, Plaintiff fails to differentiate between the Defendants, repeatedly referring to "Defendants" or asserting allegations against all three entities without any attempt to plead specific facts regarding any of them. This is insufficient to meet the federal pleading standard. *See, e.g.*, *Kaminski*, 2010 WL 4817057 at *2 (dismissing complaint and holding plaintiffs did not satisfy their pleading obligation "with respect to defendants' status as FLSA employers" by alleging that they "worked for" or were "employed by" defendant) (Appendix, Ex. 5); *Howard*, 2014 WL 1321844, at *3 ("At least some facts of the employment relationship must be set forth in order to make out a facially plausible claim of joint employer liability under the FLSA.") (Appendix, Ex. 3); *Hamilton*, 2016 WL 3962810, at *5 (holding where plaintiffs fail to allege an FLSA employment relationship, there can be no case or controversy to support standing) (Appendix, Ex. 4).[2] Thus, Plaintiff fails to allege which entity is allegedly directing the actions complained of and which entity is allegedly engaged in each action against each Plaintiff. Plaintiff's use of "labels and conclusions" and a "formulaic recitation of the elements" in alleging employment relationships is wholly insufficient. *Iqbal*, 556 U.S. at 678. Moreover, Plaintiff's failure to distinguish between the three entities means there are no specific facts demonstrating that any of the three named entities had the power to hire and fire Plaintiff, supervise or control him, determine his rate and method of payment, or maintain employment records or determine where such records were maintained. *See Joaquin*, 2016 WL 3906820, at *2 (articulating factors).

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[2] *See also Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 961 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 804 (2016) (affirming district court's dismissal of complaint where plaintiffs failed to sufficiently plead the defendants were joint employers and instead attempted to rely on the conclusory claim that defendants were "part of an integrated enterprise," which was insufficient to satisfy Rule 12(b)(6)); *Crumbling v.Miyabi Murrells Inlet, LLC*, No. 2:15-cv-4902-PMD, 2016 WL 3351351, at *4-5 (D.S.C. June 16, 2016) (bare allegations that defendants shared a common business purpose and that one defendant operated a website listing various locations were insufficient to show joint employment and confer standing on plaintiffs) (Appendix, Ex. 6); *Chen v. Domino's Pizza, Inc.*, No. 09-107, 2009 WL 3379946, at *4-5 (D.N.J. Oct. 16, 2009) ("conclusory statement" that defendant "is an employer 'within the meaning of 29 U.S.C. § 203(d)'" was insufficient to state FLSA claims against that defendant) (Appendix, Ex. 7); *Cavallaro v. UMass Mem'l Health Care, Inc.*, No. 09-40152, 2011 WL 2295023 at *3 (D. Mass. June 8, 2011) (Appendix, Ex. 8) *vacated on other grounds Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1 (1st Cir. 2012) (dismissing complaint where it contained conclusory legal assertions including "at all relevant times, plaintiffs were employees under the FLSA."); *Mackereth v. Kooma, Inc.*, No. 14-04824, 2015 WL 2337273, at *5-7 (E.D. Pa. May 14, 2015) (dismissing one of the co-defendants for failure to allege sufficient facts to support that co-defendant was the plaintiffs' joint employer where "[t]he only alleged connection between [the dismissed defendant] and the other named defendants is the assertion" of a common manager.) (Appendix, Ex. 9).

Further, a "[m]ere corporate relationship is . . . insufficient to give standing to sue under the FLSA." *Joaquin*, 2016 WL 3906820, at *5 (Appendix, Ex. 1); *see also id.* at *8 (finding plaintiffs failed to plead "any facts regarding their ***individual*** employment relationships with each Defendant employer sufficient to withstand a motion to dismiss" and emphasizing "Plaintiffs must plead separate employment, separate payment from the employers, and separate injuries regarding their wages and tips by each employer to establish standing"); *Davis v. Abington Mem'l Hosp.*, No. 09-5520, 2012 WL 3206030, at *4-5 (E.D. Pa. Aug. 7, 2012) (dismissing four named defendant medical centers where complaint contained only "generalized assertions" regarding relationship to properly named defendant medical center and reasoning that "[t]o establish that these medical centers are employers under the FLSA, [] [p]laintiffs must also connect the [d]efendants to the allegations of wrongdoing or show that these medical centers exert significant control over the employment of the named [p]laintiffs. . . . These [d]efendants cannot be held liable merely because they have common ownership or are otherwise part of a common enterprise wherein some entities are employers of the named [p]laintiffs.") (Appendix, Ex. 10).

Therefore, Plaintiff's allegations fail to sufficiently plead facts to establish any requisite employment relationship with any one or more of the three named entities. Because Plaintiff has not alleged facts to establish which entity, if any, allegedly employed him, he also cannot satisfy the requirement to show he suffered an injury that is traceable to the challenged conduct of any one or more of the named Defendants. *See Spokeo*, 136 S. Ct. at 1547. Because Plaintiff fails to identify an employing entity, he cannot possibly "fairly trace" an "injury-in-fact" to the "actions of the defendant," and thus has not established constitutional standing.

B. Plaintiff Fails To State A Plausible Claim For Overtime Violations Under The FLSA.

The FLSA provides that "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). To succeed on a FLSA overtime claim, a plaintiff must show: "(1) that there existed an employer-employee relationship during the unpaid overtime periods claimed; (2) that the employee engaged in activities within the coverage of the FLSA; (3) that the employer violated the FLSA's overtime wage requirements; and (4) the amount of overtime compensation due." *Johnson v. Heckmann Water Res. (CVR), Inc.*, 758 F.3d 627, 630 (5th Cir. 2014). Plaintiff fails to allege facts sufficient to support an FLSA claim.

Defendants already established the Plaintiff failed to establish an employment/employee relationship, which, alone, warrants immediate dismissal of Plaintiff's claim for overtime. However, Plaintiff also wholly fails to plead sufficient facts to (1) support a claim for coverage under the FLSA and (2) support a claim for overtime under the FLSA.

1. Plaintiff Fails To State Sufficient Facts To Support FLSA Coverage.

The FLSA guarantees overtime pay to employees who are "engaged in the production of goods for commerce ("individual coverage") or employed in an enterprise engaged in commerce or in the production of goods for commerce ("enterprise coverage")." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir. 1992). To state a claim for failure to pay overtime under the FLSA, "a plaintiff must either allege facts that, if proved, would establish individual or enterprise coverage under the FLSA." *Teaney v. Kenneth & Co. Honey Do Servs., LLC*, No. 2:12-CV-4211-L, 2014 WL 3435416, at *3 (N.D. Tex. July 15, 2014) (Appendix, Ex. 11).

Here, Plaintiff makes no allegations regarding coverage or commerce. Instead he assumes coverage, generally asserting that "Welders" are "employees" under the FLSA and Defendants are "employers" under the FLSA. [ECF No. 1 at Preamble, ¶¶ 8, 16.] Plaintiff makes no allegations, much less specific facts, to establish FLSA coverage. Such failure warrants dismissal under *Twombly*.

For example, in *Teaney*, the Northern District found the following allegations—notably more detailed than to those asserted by Plaintiff here—to be *insufficient* to state a claim and granted dismissal: "Plaintiff was individually engaged in commerce and the handling of goods that have been produced and moved in such commerce, doing work essential to Defendant's business." *Teaney*, 2014 WL 3435416, at *4 (Appendix, Ex. 11). The Northern District agreed with the defendant's position that the plaintiff failed to "allege any facts whatsoever to support individual coverage . . . [and that] [h]e merely states in conclusory fashion that he 'was individually engaged in commerce.'" *Id.*; *see also Whitlock v. That Toe Co., LLC*, No. 3:14-CV-2298-L, 2015 WL 1914606, at *3 (N.D. Tex. Apr. 28, 2015) (finding plaintiff's allegations that the defendant "was an enterprise engaged in interstate commerce . . . [and] Defendants regularly owned and operated a business engaged in commerce or in the production of goods for commerce . . . [and] Plaintiff was individually engaged in commerce and his work was essential to Defendants' business" threadbare and conclusory) (Appendix, Ex. 12); *Rodriguez v. Shan Namkeen, Inc.*, No. 3:15-CV-3370-BK, 2017 WL 76929, at *2 (N.D. Tex. Jan. 9, 2017) (dismissing complaint finding plaintiff's allegations that "Plaintiff's work for the [d]efendants affected interstate commerce . . . because the materials and goods that [p]laintiff handles and/or used on a constant and/or continual basis and/or that were supplied to [p]laintiff by the [d]efendants to use on the job moved through interstate commerce prior to and/or subsequent to

[p]laintiff's use of the same" amounted to a threadbare recitation of the elements of individual coverage under the FLSA) (Appendix, Ex. 13); *Coleman v. John Moore Serivces, Inc.*, 2014 WL 51290, at *3 (N.D. Tex. Jan. 7, 2014) (dismissing FLSA claims finding mere recitation of FLSA coverage and generalized facts do not satisfy the pleading requirements necessary to survive a motion to dismiss) (Appendix, Ex. 14).[3]

Like the plaintiffs in *Teaney*, *Whitlock, and Rodriguez*, Plaintiff's failure to plead sufficient facts to establish coverage under the FLSA is fatal to his claims. Accordingly, Defendants respectfully request the Court dismiss Plaintiff's Complaint.

2. Plaintiff Fails To State Sufficient Facts To Support His Claim For Failure To Pay Overtime Under The FLSA.

Plaintiff's substantive allegations are similarly deficient. Plaintiff generally alleges Defendants violated the FLSA by failing to pay him overtime. [ECF No. 1, at ¶¶ 3, 15, 19, 35-36, 37, 39, 40-44.] Federal law is clear: to survive a motion to dismiss, a plaintiff must make specific allegations and provide a factual context regarding the hours he or she worked without adequate compensation. *Landers v. Quality Communications, Inc.*, 771 F.3d 638, 644-45 (9th Cir. 2014). A plaintiff "must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek." *Id.* (citing *Pruell*, 678 F.3d at 13); *see also Johnson*, 758 F.3d at 630 (plaintiff must plead "approximate date ranges, as well as the approximate number of hours worked, for which the plaintiff claims he was under compensated" to survive a motion to dismiss). For example, a plaintiff "may

[3] *See, e.g.*, *Centeno v. Facilities Consulting Grp., Inc.*, No. 3:14-CV-3696-G, 2015 WL 247735, at *10 (N.D. Tex. Jan. 20, 2015) (dismissing FLSA claims where plaintiff's allegations of individual and enterprise coverage "fail[ed] to provide factual allegations pertaining specifically to the dispute at issue") (Appendix, Ex. 15); *Lindgren v. Spears*, No. H-10-1929, 2010 WL 5437270, at *3 (S.D. Tex. Dec. 27, 2010) (dismissing FLSA claim where the "allegations of FLSA coverage are conclusory [and] merely repeat the statutory elements of coverage") (Appendix, Ex. 16).

establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." *Landers*, 771 F.3d at 645. But, at minimum, a plaintiff "should be able to specify at least one workweek in which they worked in excess of forty hours and were not paid overtime wages." *Id.* at 646; *see also Bustillos v. Academy Bus, LLC*, No. 12 Civ. 565 (AJN), 2014 WL 116012, at *4 (S.D.N.Y. Jan. 13, 2014) ("[T]here should be sufficient factual allegations in the [Complaint] – rather than a general and conclusory allegation as to the number of hours 'routinely' worked—whereby the Court can reasonably infer that there was indeed one or more ***particular*** workweek(s) in which the plaintiff suffered an overtime violation.") (emphasis added) (Appendix, Ex. 17).

On the other hand, mere statements that a plaintiff "regularly" or "consistently" worked more than forty hours but was not paid overtime do not satisfy the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. *Id.*; *Pruell*, 678 F.3d at 12; (dismissing claims that simply alleged that "putative class members 'regularly worked' over 40 hours a week and were not compensated for such time); *Dejesus*, 726 F.3d 85 at 89 (dismissing claims where plaintiff "alleged only that in 'some or all weeks' she worked more than 'forty hours' a week without being paid '1.5' times her rate of compensation").

District courts of Texas are in accord. *See, e.g., Hernandez v. Praxair Distribution*, 2015 WL 5608233, at *2 (S.D. Tex. Sept. 23, 2015) (dismissing FLSA claims when the plaintiff failed to allege details regarding his overtime claim, such as the dates, hours, or frequency of his overtime work) (Appendix, Ex. 18); *Coleman*, 2014 U.S. Dist. 1501, at *4 (dismissing FLSA claims when the plaintiff's allegations amounted to a repetition of the statute) (Appendix, Ex. 14).

Contrary to this standard, Plaintiff alleges no specific facts or context for his overtime allegations. Instead, Plaintiff alleges generally that he "regularly worked more than 40 hours in a workweek." [ECF No. 1 at ¶ 35; *see also id.* at ¶ 37 (alleging "Welders worked over forty hours per week").] Similarly, Plaintiff merely alleges that he worked "between 10 and 12 hours a day," with no indication of how many days per week, or whether this includes any preliminary work, postliminary work, meal breaks, or other work potentially not compensable under the FLSA. [*See id.* at ¶ 26.] Indeed, Plaintiff provides no factual context for his bare allegations at all. Instead, he merely repeats that he was paid "straight time" rather than the "overtime" he was owed. [*See id.* at ¶¶ Preamble, 3, 15, 19, 37, 40, 41.]

Without supporting factual allegations, similar conclusory allegations have been held insufficient as a matter of law under the *Twombly/Iqbal* standard. *See, e.g., Pruell*, 678 F.3d at 12; *Hernandez*, 2015 WL 5608233, at *2 (Appendix, Ex. 18). Like the claims dismissed in *Johnson*, *Landers*, *Hernandez*, and *Coleman*, Plaintiff's allegations do not provide enough detail to make his right to relief plausible, as opposed to simply possible. Plaintiff's claim for overtime under the FLSA should be dismissed.

3. Plaintiff Fails To State Sufficient Facts To Support His Collective Action Claim For Failure To Pay Overtime.

As Plaintiff's individual allegations are identical and incorporated into Plaintiff's collective action allegations, Plaintiff's class action allegations are likewise insufficient to state a claim under *Twombly* and *Iqbal*. Aside from bare allegations, Plaintiff asserts nothing more than formulaic recitations of elements of a claim for failure to pay overtime under the FLSA and conclusory allegations that Defendants violated the law. Plaintiff's allegations do not meet his obligation of providing the grounds of his entitlement for relief and do not "nudge [his] claim[] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Plaintiff further fails to identify how a common policy or plan affects the pay structure: Plaintiff merely alleges that Defendants had a policy of failing to compensate for overtime, but does not allege whether the employees were hourly or salaried or how often and how long they worked in excess of forty hours per week. *See Huchingson v. Rao*, No. 5:14-CV-1118, 2015 WL 1655113, at *4 (W.D. Tex. Apr. 14, 2015) (dismissing plaintiff's complaint for failure to adequately plead a policy or practice of defendants to support a putative class claim) (Appendix, Ex. 19). Because Plaintiff fails to plead a policy and/or practice of Defendants to support a claim on behalf of a putative class, the Court must dismiss Plaintiff's class claims.

C. Plaintiff Fails To State Sufficient Facts To Identify A Putative Class.

When reviewing Rule 12(b)(6) motions in the context of an FLSA case, "courts should 'distinguish between individual . . . claims and those brought on behalf of a putative class.'" *Flores v. Act Event Servs., Inc.*, 55 F. Supp. 3d 928, 933-34 (N.D. Tex. 2014) (quoting *Creech v. Holiday CVS, LLC*, No. 11-46-BAJ-DLD, 2012 WL 4483384, at *3 (M.D. La. Sept. 28, 2012) (Appendix, Ex. 20)) (internal quotations omitted). To withstand a Rule 12(b)(6) motion, courts "require plaintiffs to give the defendant fair notice of the putative class." *Id.* at 934, 940 (dismissing collective action because the complaint "fails to provide any such description or details about the other proposed parties who are alleged to be similarly situated."); *see also Jones v. Warren Unilube, Inc.*, No. 5:16-CV-264-DAE, 2016 WL 4586044, at *3 (W.D. Tex. Sept. 1, 2016) (dismissing class claims finding the putative class definition was insufficient under *Twombly* where the definition did "not include any information regarding the geographic location of these employees, any description of such employees' job duties, or an allegation that these employees worked more than forty hours per week.") (Appendix, Ex. 21).[4]

Here, Plaintiff purports to assert his collective action claims on behalf of:

> All Welders who worked for Precision Drilling Company LP, PD Supply Inc., and Precision Drilling Corporation at all of its locations throughout the United States while receiving straight time instead of time and a half for overtime hours worked in the last three years.

ECF No. 1, at ¶ 39.

Plaintiff fails to give Defendants fair notice of the putative class by providing the necessary facts to identify the putative class. Though "Welders" is capitalized, it is not defined within the Complaint. Thus, Plaintiff fails to plead the specific job titles or precise job requirements of the various putative class members necessary to survive a motion to dismiss. *See Flores*, 55 F. Supp. 3d at 940 (dismissing putative class claims under Rule 12(b)(6) where the complaint stated, "Named Plaintiffs seek to represent a nationwide class of all persons who worked or work for Defendants and who were/are subject to Defendants' unlawful pay practices and policies at any point from three years prior to the filing of the instant matter to the present."); *Longoria v. KHM Rentals, LLC*, No. SA-13-CA-1143-FB, 2015 WL 12734176, at *3 (W.D. Tex. July 27, 2015) (holding "named plaintiffs should each provide their job description so that the Court and defendants can determine if they are truly not exempt and if they will be similarly-situated to the other not yet named plaintiffs.") (Appendix, Ex. 22); *Ecoquij-Tzep v. Hawaiian Grill*, No. 3:16-CV-00625-M, 2016 WL 3745685, at *5 (N.D. Tex. July 12, 2016) (dismissing class action allegations under 12(b)(6) for failure to sufficiently plead a putative class to provide defendant with the requisite notice) (Appendix, Ex. 23).

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[4] *See, e.g.*, *St. Croix v. Gentech, Inc.*, No. 8:12-CV-891-T-33EAJ, 2012 WL 2376668, at *3 (M.D. Fla. June 22, 2012) (dismissing collective action where "there [was] no description of the job duties of the proposed similarly situated employees.") (Appendix, Ex. 24); *England v. Adm'r s of the Tulane Educ. Fund*, No. CV 16-3184, 2016 WL 3902595, at *4 (E.D. La. July 19, 2016) (proposed putative class "must provide details about or descriptions of the similarly situated parties, along with sufficient facts to show that they were subject to the same pay provisions.") (Appendix, Ex. 25).

Like the plaintiff in *Flores*, Plaintiff seeks to represent any and every "Welder" from the past three years, regardless of job description, regardless of the location of his or her job site, regardless of when and/or how wages are paid, and regardless if the employee was allegedly misclassified as an independent contractor or exempt, or was an hourly employee. These ambiguities are made even more egregious by the fact that Plaintiff apparently intends to represent employees employed by all three named Defendants, including those employees located out of state. [*See* ECF, No. 1 at ¶ 5.] Such ambiguity fails to give Defendants the proper notice of the scope of the alleged putative class and is fatal to Plaintiff's collective action claims.

VI.
CONCLUSION

For the reasons set forth herein, Defendants respectfully request that the Court dismiss Plaintiff's collective action complaint with prejudice for failure to meet the pleading requirements articulated in *Iqbal* and *Twombly*.

Dated: May 18, 2017

Respectfully submitted,

s/ David B. Jordan

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed this document with the Clerk of Court for the U.S. District Court, Southern District of Texas, using the Electronic Case Filing System of the Court. The Electronic Case Filing System sent a "Notice of Electronic Filing" to the following counsel of record:

/s/ David B. Jordan
David B. Jordan